

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 22, 2005

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Plywood of Tacoma
Case 19-CA-29536

530-4075
530-8081-9300
787-8000

This Section 8(a)(5) case was submitted for advice regarding whether, upon contract expiration, the Employer unlawfully withdrew recognition from the Union as the collective-bargaining representative of a departmental group of employees within the bargaining unit. The Employer claimed that its partial withdrawal of recognition was lawful because its initial recognition of the Union as representative of the disputed group of employees, outside the Section 10(b) period, was unlawful.

We conclude that the Employer's partial withdrawal of recognition was unlawful. The Employer voluntarily recognized the Union as the representative of the employees more than three years ago as demonstrated by the parties' course of conduct. The Employer is now both equitably estopped and time-barred from raising as a defense to the instant Section 8(a)(5) charge that its initial recognition of the Union for the disputed group of employees was improper.¹

FACTS

I. The Parties' Original Bargaining Unit; the Employer Creates a New Department.

Since 1958, Plywood of Tacoma ("the Employer") and Teamsters Local 313 ("the Union") have been parties to successive collective-bargaining agreements covering a combined unit of Tacoma, Washington warehouse employees and delivery drivers. The parties' most recent collective-bargaining agreement extended from September 1999 to August 31, 2004. The contract provides in the preamble

¹ The Region has made a recommendation regarding Section 10(j) injunctive relief. That issue will be dealt with in a separate memorandum by the Injunction Litigation Branch.

that the agreement covers the "employment of Drivers, Helpers and the Bull-lifts" and excludes all other employees. Article 1.01 provides that "the Employer recognizes and will continue to recognize the Union as the sole collective bargaining agent for all employees set forth in the Wage Schedule attached hereto." The attached wage schedule makes no mention of employees other than drivers, helpers and warehousemen. The labor agreement has a union security provision. The contract also has a no-strike clause (article 12).

In late 1997 or early 1998, the Employer started a door shop production operation in a Puyallup, Washington facility where it employed two employees, one of whom acted as a leadperson. The Union did not represent these door shop employees. In late 2001, during the term of the parties' most recent driver-warehouse contract, the Employer moved the door shop operation from Puyallup to the Employer's four-warehouse complex in Tacoma. Within one of the unit warehouses, the Employer built a separate area for the door shop operation.²

At this time, the Tacoma warehouse supervisor directed the non-leadperson door shop employee to join the Union. The supervisor claimed that the Employer wanted the door shop employee to perform some warehouse work.³ In December 2001, the Employer began making contributions on the employee's behalf to the Union's pension, health and welfare plans, and this employee began paying Union dues. The employee received a raise that increased his wages to Union scale under the labor agreement and he began to receive sick leave.⁴

² The Union states that it knew of the existence of the door shop when the Employer moved it to Tacoma; the Employer contests this assertion.

³ The employee never performed any warehouse work.

⁴ The Employer did not require that the former Puyallup leadperson join the Union because it did not plan to assign him warehouse work. In August 2002, that employee became a manager.

II. The Door Shop Expansion in 2002 and 2003

In late 2002, the Employer increased door shop production and hired more door shop employees. Beginning in late 2002, the Employer employed at various times between three and six door shop employees, including the original Puyallup employee. The Employer required each new door shop employee to join the Union after a three-month probationary period. There is no evidence that any of these new door shop employees had designated or selected the Union to be their collective-bargaining representative prior to their inclusion in the driver-warehouse unit. The new door shop employees, with the exception of one worker who did not pass the Employer's probationary period, paid Union dues and the Employer made contributions to the Union pension and health plans on their behalf. In April 2003, the Employer moved the door shop to a larger location in another warehouse within the same Tacoma warehouse complex, purchased more machinery, and hired a door shop foreman. Warehouse employees and drivers are not qualified to perform door shop production work, and door shop employees are not qualified to perform warehouse or driver work. There is no evidence of employee interchange between the door shop and the driver/warehouse departments.

III. Application of the Labor Agreement to the Door Shop Employees

Door shop employees received such contractual benefits as overtime, sick leave, and vacations. As noted, the Employer paid regular contributions into the Union's health and pension plans on behalf of all door shop employees.

As to employees' pay, the Region has found that \$18.44/hour is the highest contractual wage rate, and that 10 out of 13 warehouse employees and drivers and the most senior door shop employee earn that amount. The three other driver/warehouse employees who are not earning the top contractual rate each earn different wage rates, \$17.80, \$16.27, and \$15.16. Two door shop employees earn \$16.78 and \$14.24. The Region has also determined that the payroll records do not show exactly how the Employer has applied the collective-bargaining agreement wage rates to any of its employees, or even whether the Employer has applied the contract's stated wage rates to its employees.⁵

⁵ At least one warehouse employee who should be earning more than another employee based on the contract's terms is actually earning less.

Under the parties' collective-bargaining agreement, seniority affects vacations, reductions in force, and overtime. The Employer does not have a formal seniority list for the door shop employees, and does not apply facility-wide seniority to the door shop. In the door shop, employees follow seniority on an informal basis in deciding vacation times. Customarily the most senior employee chooses vacation dates first, and thereafter the other employees choose their vacations times. The Employer has never imposed a layoff.

As to discipline, the Employer suspended one door shop employee, without the contractually required notice to the Union which the Employer has always supplied when disciplining warehouse employees or drivers.⁶ The Union asserts that this discipline was informal and that the affected employee later quit without notice to the Employer. During the term of the parties' last collective-bargaining agreement, no door shop employee has ever filed a grievance.

In November 2003, the Employer asked the Union to switch to a less expensive health and welfare plan. In response, the Union called a meeting in late November or early December 2003 for unit employees to discuss the Employer's request and arranged for three alternate plans to make presentations. At least three door shop employees attended that meeting. The unit employees decided to retain their existing plan.

On about December 2, 2004, the warehouse employees, drivers, and door shop employees received a contractual retroactive cost-of-living increase. The Employer has also given other contractual wage increases to door shop employees.

In January 2004, the Employer removed certain non-bargaining unit employees from coverage under a Union health plan.⁷ The Employer did not at this time remove the door shop employees from the Union's health plan coverage.

During the parties' most recent labor contract, the parties never bargained or discussed modifying the agreement's recognition clause or the attached wage schedule to specifically refer to the door shop employees.

⁶ The Employer did not specify the length of the suspension.

⁷ In May 2002 the Employer had reached an agreement with the health plan's Trust to permit coverage of non-unit employees (i.e., clericals and administrative staff).

The Employer states that it directed door shop employees to join the Union because it believed that after having directed the first door shop employee to join, it was required to direct all later hired door shop employees to do the same.

IV. The Employer Withdraws Recognition from the Union as the Representative of the Door Shop Employees.

In August 2004, the Union and the Employer began negotiations for a new contract. Neither the Union's initial August 19 proposal nor the Employer's initial September 28 proposal included the door shop department and production employees in the recognition clause or attached wage schedule.

In October 2004, the Employer informed the door shop employees that they were no longer in the Union, that the collective-bargaining agreement did not cover them, and that the Employer was moving them into different benefit plans. The Employer asserted that the contract covered only warehouse employees and drivers, and told at least one door shop employee that he would earn higher wages if he were not in the Union. One of the employees relayed the Employer's statements to the Union.

During an October 26 bargaining session, the Union proposed a new recognition clause that specifically referred to the door shop employees.

On November 1, the Employer ceased contributing to the Union's pension and health and welfare plans on behalf of the door shop employees. Shortly thereafter, the Employer met with door shop employees individually, supplying each employee information on a new health plan and a 401(k) plan. During these meetings, the Employer asked two door shop employees about the status of their Union dues. The Employer later reimbursed the two employees for their pending dues, which included arrears of about \$460 for one employee.

After the meetings with the door shop employees, the Employer continued to assert that the Union did not represent the door shop employees and the Employer refused to bargain over their working conditions. By letter dated November 4, the Union told the Employer that it had unlawfully removed the door shop employees from the bargaining unit. In that same letter, the Union requested information about unit employees' terms and conditions of

employment, specifically including door shop employees as part of that unit.⁸

ACTION

We conclude that the Employer's partial withdrawal of recognition from the Union was unlawful and that the Region should issue a Section 8(a)(5) complaint, absent settlement. The Employer voluntarily recognized the Union as the exclusive collective-representative of the door shop employees more than three years ago, and it is now both estopped and time-barred from raising as a defense the claim that its initial recognition of the Union as the representative of the door shop employees was unlawful in the absence of a prior designation of majority support.

I. Implicit Voluntary Recognition

Where there has been a showing of a union's majority support, parties can voluntarily enter into labor agreements which grant the union Section 9(a) status.⁹ An employer's voluntary recognition of a union as exclusive bargaining representative, however, must be established by a clear and unequivocal agreement on the part of the employer to so recognize the union.¹⁰ Such agreement may be proven by implicit recognition through a course of consistent conduct by the parties.¹¹ Once the employer's

⁸ The Employer's current workforce in Tacoma numbers about 40 employees, with about 13 to 15 warehouse employees and drivers and 6 door shop employees.

⁹ See, e.g., Eklund's Sweden House Inn, Inc., 203 NLRB 413 (1973) (successor employer agrees to abide by terms of predecessor employer's labor agreement).

¹⁰ See Terracon, Inc., 339 NLRB 221, 223 (2003), affd. sub nom. Operating Engineers, Local 150 v. NLRB, 361 F.3d 395 (7th Cir. 2004) (insufficient evidence that employer extended recognition to union after purported card check).

¹¹ Almost all of the cases in which the Board has dealt with implicit voluntary recognition have involved some type of card check arrangement by the parties. See, e.g., Lyon & Ryan Ford, Inc., 246 NLRB 1, 4 (1979), enfd. 647 F.2d 745 (7th Cir.), cert. denied, 454 U.S. 894 (1981) (employer's course of conduct after union demonstrated card majority constituted agreement to recognize union: after company checked cards, company examined union's proposed contract, discussed contractual provisions, scheduled two other meetings, permitted union to speak to employees during

recognition of the union is proven, at the expiration of a collective-bargaining agreement, lawful on its face, a rebuttable presumption exists that the incumbent union enjoys continued majority status among the bargaining unit employees.¹²

Applying the above principles, we agree with the Region that the Employer voluntarily recognized the Union as the representative of the door shop production employees in late 2001. The Employer's entire course of conduct since 2001 reflected an implicit and consistent recognition of the Union as the representative of a bargaining unit that included the door shop employees. The Employer has consistently treated the door shop employees and the driver and warehouse employees as a single unit.

Several factors show that the Employer has consistently recognized the Union as the representative of the door shop employees. First, the Employer instructed door shop employees, beginning with the original Puyallup employee and continuing with new hires with the door shop expansion, to join the Union and pay dues. Even after its withdrawal of recognition, the Employer paid Union dues arrears for certain door shop employees to keep them in good standing with Union. For the three years prior to its withdrawal of recognition, the Employer applied most of the labor contract's terms to the door shop employees, such as sick leave, vacation, pension, health and welfare benefits, holiday pay, and overtime. The Employer also applied a retroactive cost of living to all unit employees, including the door shop employees. In January 2004, the Employer removed its nonunit employees from the Union health plan, but continued to pay the Union health plan contributions for the door shop employees along with the other unit employees. As to its representational duties, the Union has treated the door shop employees as unit members. Thus, the door shop employees were included in the late 2003 Union meeting called to discuss the Employer's proposal midterm for changes in health and welfare plans. Finally, when the Employer suddenly decided in the fall of 2004 to withdraw recognition, it told the door shop employees that they would not be covered by the labor contract and that they were no longer in the Union. The Employer thus

working hours, did not object to scope of unit and negotiated with union over coverage of unit).

¹² See, e.g., KBMS, Inc., 278 NLRB 826, 846 (1986), and the cases cited therein; Food Mart Eureka, 323 NLRB 1288, 1294 (1997).

clearly indicated that the door shop employees had been covered by the contract before then.

We recognize that not all the terms of the labor agreement were consistently applied to the door shop department. However, any differences in application of contract terms are of minimal importance. As to wages, as the Region has found, the Employer did not strictly apply the stated contractual terms at all, both as to the driver/warehouse employees and as to the door shop employees. However, the Employer did apply contractual cost of living increases to all unit employees, including the door shop employees. Moreover, the door shop employees were not paid significantly differently than the other unit employees. One door shop employee received the same wage rate as the vast majority of warehouse/driver employees. Of the other two door shop employees, one received wages within the range of the other lower-paid driver/warehouse employees. The other door shop employee was paid less than \$1.00 than that earned by the lowest paid driver/warehouse employee.

As to seniority, although the Employer did not apply seniority on a unit-wide basis, the differences in application have not affected the door shop employees. There has been no history of layoffs to which seniority would be relevant. The parties have also had no other need to incorporate the door shop employees into a unit-wide seniority roster for vacation schedules, and they have recognized that it is beneficial to apply seniority on an informal basis within the door shop. Thus, the door shop workers perform different work from, and may need to be present at different times than, the warehouse employees. The number of employees performing door shop work has been so small that the employees could informally adjust vacation schedules after allowing the most senior to first select his vacation time.

As to discipline, the one instance of discipline among the door shop employees, a suspension without notice to the Union, was imposed on a short term, five-month employee. We would argue that since this was the only difference in contract application between the two employee groups which did not also have an explanation related to the different types of work performed by those groups, it was not significant enough to establish that the parties did not have a true collective-bargaining relationship as to the door shop employees.

Finally, although the parties did not modify the contract after the door shop employees were added to the unit so that the recognition clause reflected the altered unit composition, that failure to clarify the unit description should not serve to undermine a well-established three-year collective-bargaining relationship. The relationship between the two parties functioned successfully. Contractual benefits were applied uniformly among the door shop employees and, except as noted above, consistently with those enjoyed by the driver/warehouse employees. In such circumstances, there was no need for the parties to formalize the merger of the door shop employees into the unit of driver/warehouse employees by modifying the contract's recognition clause.

In sum, the bulk of the available evidence supports the conclusion that both the Employer and the Union consistently acted as if the door shop employees were part of the established bargaining unit of the drivers and warehouse employees and were represented by the Union. Upon the expiration of the parties' last labor agreement, the Union enjoyed a rebuttable presumption of majority support which the Employer has not rebutted. Indeed, as discussed *infra*, the Employer does not claim that the Union has lost majority support in either the overall unit or even among the door shop employees. Rather, the Employer claims merely that its original recognition of the Union for the door shop employees was improper in the absence of the Union's majority support.

II. Equitable Estoppel and Section 10(b)

A. Equitable Estoppel

The gist of equitable estoppel is that a party who, by his statements or conduct, has asserted a claim based upon the assumption of the truth of certain facts by means of which he has obtained a benefit from another party, cannot later assert that those facts are not true if the other party thereby will be prejudiced.¹³ The elements of

¹³ See Red Coats, Inc., 328 NLRB 205, 206 (1999), quoting McClintok, Principles of Equity, at p. 80 (2d ed. 1948) (employer estopped from challenging single location bargaining units where employer had extended voluntary recognition to union on single location basis and had negotiated to impasse in such units; union detrimentally relied on employer conduct that employer would not challenge scope of units and did not resort to Board processes to clarify scope of units).

equitable estoppel as explicated by the Board include knowledge, intent, mistaken belief, and detrimental reliance.¹⁴ Those elements are satisfied here.

Thus, the Employer was aware of the door shop employees and had taken clear steps to include them under the terms of the driver-warehouse labor contract. The Employer intended to recognize the Union as the bargaining representative of those employees as shown by its conduct of instructing door shop employees to join the Union and applying the contract's terms to the door shop department. The Employer engaged in this conduct despite its knowledge that no door shop employee ever performed or, despite its stated reason for moving the door shop to the warehouse complex, ever would perform warehouse work. There was also no evidence that any of the door shop employees had designated or selected the Union to be their bargaining representative before the Employer had placed them into the driver-warehouse unit. By accepting the employees' payments of Union dues and fees and the Employer's payment of health and pension contributions, the Union detrimentally relied on the Employer's actions, and thus gave up the option of resorting to the Board's processes to establish its right to represent the door shop employees.¹⁵ The Employer enjoyed such benefits of the Union's reliance on the Employer's conduct as the labor stability afforded by applying an existing collective-bargaining agreement to its new door shop department, with its no-strike clause (article 12) protections. The Employer also had the potential ability to have door shop employees perform warehouse work, as it had at least once stated that it intended to do.

Therefore, the Employer should be estopped some three years later from withdrawing recognition from the Union as the representative for the door shop employees, based upon a claim that its original conduct was improper in the absence of a prior designation of majority support of the Union by the door shop employees and a valid accretion to the driver/warehouse unit.¹⁶

¹⁴ Id., at 206, and n.10, and the cases there cited.

¹⁵ Id., at 206.

¹⁶ See, e.g., R.P.C. Inc., 311 NLRB 232 (1993); Sewell-Allen Big Star, Inc., 294 NLRB 312 (1989), enfd. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992); Knapp-

B. Section 10(b) Bars the Employer's Defense.

Under well-settled Board law, an employer may not defend a refusal to bargain violation based upon an allegation that its recognition of the incumbent union was unlawful, where such recognition occurred outside the Section 10(b) period.¹⁷ To permit the use of such pre-10(b) evidence would undermine one of the primary purposes of the Act, i.e. the stabilization of existing bargaining relationships.¹⁸ In this case the Employer's recognition of the Union as the door shop employees' bargaining representative occurred in late 2001. The Employer is thus barred by Section 10(b) from defending its conduct in October 2004 on the basis that its unlawful recognition of the Union in 2001 privileges it to withdraw recognition from the Union as the bargaining representative of the door shop employees.

III. The Accretion Argument

[FOIA Exemptions 2 and 5] that the Employer's pre-10(b) conduct was not privileged under a proper application of the Board's "accretion" doctrine. That doctrine permits an employer to add a new group of employees into an established bargaining unit without a showing of prior designation of the union's majority support. The Board applies a "restrictive policy" regarding accretions, in order to safeguard employee freedom of choice.¹⁹ In determining whether new employees may properly be accreted or added to an existing bargaining unit, the Board generally applies an "overwhelming" community of interest

Sherrill Company, 263 NLRB 396, 398 (1982) (all untimely challenges to union mergers or affiliations).

¹⁷ See, e.g., North Bros. Ford, Inc., 220 NLRB 1021 (1975) (untimely challenge to status of successor local); Route 22 Toyota, 337 NLRB 84, 85 (2001) (pre-10(b) union affiliation); NLRB v. Morse Shoe, Inc., 591 F.2d 542, 545 (9th Cir. 1979) (untimely challenge to propriety of unit in withdrawing recognition).

¹⁸ See Route 22 Toyota, 337 NLRB at 85, citing Local Lodge 1424 IAM (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411, 419 (1960).

¹⁹ See, e.g., Towne Ford, 270 NLRB 311 (1984), affd. 759 F.2d 1477 (9th Cir. 1985); North Hills Office Services, 342 NLRB No. 25 (2004), ALJD at p. 7.

test. The test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees."²⁰ The Board's policy is to disfavor accretions unless the group of employees sought to be added to an existing bargaining unit "have little or no separate identity . . . and share an overwhelming community of interest with the preexisting unit."²¹

In our view, the Employer is correct that once the door shop department expanded beyond one statutory employee, no valid accretion could occur into the warehouse/driver unit.²² Thus, the door shop department could have existed as a separate appropriate unit once the group included at least two employees. In this regard, the door shop employees had different job skills and duties from the larger warehouse/driver employee group and there was no employee interchange between the two groups of employees. There was clearly some separate group identity for the door shop department,²³ and therefore those employees had no overwhelming community of interest with the warehouse/driver employees.²⁴

While the Employer is correct in its accretion analysis, it cannot defend its otherwise unlawful conduct in this case based on improper accretion because of equitable estoppel and Section 10(b), as discussed above in Section II.

²⁰ Gould, Inc., 263 NLRB 442, 445 (1982).

²¹ Safeway Stores, Inc., 256 NLRB 918 (1981).

²² It is clear that a single employee cannot be a separate, appropriate collective-bargaining unit. See, e.g., The Vila-Barr Company, 157 NLRB 588, 589 n.5 (1966).

²³ See, e.g., how the door shop department informally handled the scheduling of vacations.

²⁴ See Safeway Stores, Inc., 256 NLRB at 918-919 (no valid accretion where skills and duties of two groups of employees were not sufficiently similar to establish an overwhelming community of interest between delicatessen and bakery sales departments). Accord: Weatherite Company, Inc., 261 NLRB 667 (1982) (different job skills and lack of employee interchange precluded accretion).

IV. The Board's Ace-Doran Line of Cases Does Not Preclude Issuance of Complaint.

We recognize that there is a line of case authority where the Board has found no enforceable bargaining relationship following an asserted voluntary recognition and compliance with an alleged labor agreement.²⁵ In those cases, the Board holds that the purported labor agreement had no "contract bar" effect and did not give rise to a presumption of the incumbent union's continued majority status. We do not believe that the rationale of those cases precludes the issuance of complaint herein. In those cases the purported labor contract either did not define the bargaining unit with sufficient clarity and/or the parties' conduct during the term of the agreement showed that they never intended to establish a true collective-bargaining relationship. Thus, the parties either had an arrangement to apply the terms of the contract only to certain unit employees or failed to administer the contract or represent the employees to such an extent that the inference was inescapable that the parties never intended to enter into a bona fide collective-bargaining relationship.

In Ace-Doran Hauling & Rigging Co., the unit was so ill-defined that no presumption of majority status could apply.²⁶ Further, the parties did not intend their past bargaining agreements to be effective labor contracts, but instead merely regarded them as arrangements under which the employer agreed to check off union dues and make health, welfare, and pension contributions only for union members. The union acquiesced in the employer's failure to

²⁵ See, e.g., Ace-Doran Hauling & Rigging Co., 171 NLRB 645 (1968); Bender Ship Repair, 188 NLRB 615 (1971); McDonald's Drive-In Restaurant, 204 NLRB 299 (1973).

²⁶ See 171 NLRB at 645-646. In Ace-Doran, the boundaries of the unit were not defined where the evidence did not support either the employer-wide, 22-terminal, 10-state unit alleged in the General Counsel's complaint, nor the multiemployer unit advanced by the union. The employer had signed three separate contracts with three locals regarding three terminals, and a multiemployer association representative signed three separate contracts assertedly on behalf of the employer, but the employer denied that it had so authorized that representative, and there was no evidence of such authority. There was no discernible reason for the different contracts, and no agreements covered all 22 terminals. *Id.*, at 645-646.

enforce the union-security clause and to make health and welfare contributions for all employees. The parties' conduct indicated that they did not believe they were in a true collective-bargaining relationship.²⁷

In Bender Ship Repair, there was a "patent ambiguity" in the unit definition,²⁸ and the union acquiesced in the application of the collective-bargaining agreement to only a few employees.²⁹

In McDonald's Drive-In Restaurant, the Board concluded that there was "too much uncertainty" regarding the scope of the unit.³⁰ Further, employees did not enjoy such contractual benefits as wage rates, health and welfare fund contributions, meals, uniforms, job duties, holidays, and a grievance procedure. The union did not represent the employees until near the end of contract term; at that point the union submitted employee grievances to the employer and enforced the union-security clause. The Board concluded that the parties had never entered into a true collective-bargaining relationship from which a presumption of the union's majority status could arise.³¹

²⁷ Id., at 646.

²⁸ See 188 NLRB at 615. In Bender, the unit was patently ambiguous where it was variously understood by the parties to be a boilermaker craft unit, a production and maintenance unit, or a ship repair boilermaker unit, and the contractual wage schedule was not consistent with the unit description as it evolved over the terms of three contracts. Id., at 615-616.

²⁹ Id., at 616.

³⁰ See 204 NLRB at 309. In McDonald's, the scope of the unit was ambiguous where the evidence, after a review of the contracts and the bargaining history, did not conclusively show whether the union represented two separate units, each with one store, or a two-store unit. Id., at 309.

³¹ Id.

In contrast, the Board found this rationale inapplicable in Brower's Moving & Storage,³² and this decision also supports finding a Section 8(a)(5) violation in the present case. In Brower's, the parties' conduct was consistent with a true bargaining relationship, even though the employer over the years failed to honor and abide by all the provisions of the successive union agreements. The union was, however, unaware of these employer lapses. After the parties' bargaining relationship began in 1951, the union for the next three years visited the facility and collected union dues. Although the Union did not visit the facility thereafter, the employer did supply contractually required remittance reports. In 1956, the union stopped the employer's owner from performing bargaining unit work. In 1968, the union helped the employer get "set up" for hospital coverage. In 1982, the employer paid back dues so an employee could become eligible for contract coverage. In 1983 the union demanded that the employer provide an updated seniority list. Finally, in 1981 and 1987, the contractual trust fund attempted to collect employer delinquencies. In finding a violation based upon the employer's repudiation of the parties' latest agreement, the Board distinguished Ace-Doran, Bender Ship and McDonald's on the basis that in those three cases there was ambiguity in the scope of the bargaining unit and there was evidence of either "members only" contract enforcement, or of no contract enforcement. In Brower's, the contract was not enforced on a "members only" basis and the union took steps to enforce its contract over many years.³³ The trust fund's attempts to collect delinquencies were consistent with a valid agreement. There was "no evidence that the Union ever acquiesced in a repudiation of substantial portions of the contract or that the Union and the [employer] ever had an arrangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship."³⁴

The instant case was viewed as closer to the facts in Brower's than the Ace-Doran line of cases, thus warranting placing this matter before the Board. As discussed above, the parties here consistently have treated the door shop employees and the warehouse/driver employees as a single

³² Brower's Moving & Storage, Inc., 297 NLRB 207 (1989), enf'd. 914 F.2d 239 (2d Cir. 1990), cert. denied 499 U.S. 905 (1991).

³³ 297 NLRB at 208. In addition, the unit description had no ambiguity.

³⁴ *Id.*, at 209.

unit and have applied the same contractual benefits to all these employees. Unlike the Ace-Doran line of cases, this case does not involve a situation where only some employees received the benefits of the employer-union relationship. Rather, all employees, door shop and warehouse/driver, who completed their probationary periods became Union members and generally received the same contractual benefits. Both door shop employees and warehouse/driver employees have been subject to the same variations in application of the contract's wage schedules. Further, any other instances of variances in application of contractual terms, such as seniority or employee disciplinary procedures, have been insignificant.

In conclusion, the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging as unlawful the Employer's withdrawal of recognition from the Union as the collective-bargaining representative of the door shop employees in a combined unit of door shop and driver-warehouse employees.³⁵

B.J.K.

³⁵ Consistent with the merit determination regarding the withdrawal of recognition allegation, the Employer's unilateral changes in the door shop employees' health and pension benefits would also appear to violate the Act, as would the Employer's refusal to provide relevant and requested information to the Union regarding the door shop employees.